

December 3, 2003



Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of Ex parte* presentation in

MB Docket No. 98-120

MB Docket No. 03-15

Dear Ms. Dortch:

On December 2, 2003, Harold Feld, Associate Director, MAP, and Michael Calabrese, Vice President, New America Foundation, and J.H. Snider, Senior Research Fellow, NAF, met with Jordan Goldstein, legal adviser to Commissioner Copps.

NAF representatives asserted that the entire industrial policy of DTV and must carry is outdated and should be considered a failure. Perpetuating this policy via multicasting would be a grave policy mistake. Instead, the FCC and Congress should pursue a strategy of migrating the few remaining viewers of free over-the-air TV to MVPDs and opening the cable platform generally via open access so that broadband could provide an alternate video competition and valuable spectrum could be cleared.

Since this seemed enormously unlikely, the Commission should require that broadcasters demanding multicast be required to give back their spectrum by a date certain. Furthermore, "payment" for spectrum in the form of public interest obligations must not be deferred further. Public interest obligations must be determined before permitting multicasting. Mr. Snider observed that the history of DTV transition and broadcast television generally has been one where broadcasters accept spectrum access pursuant to promises of public service, but then broadcasters renegotiate when it comes time to provide substance to the obligations.

Mr. Feld observed that the public interest obligations proceeding has been pending (since issuance of the first NOI) for *four years*. By contrast, the Commission has already settled the question of multicast must carry and the NAB merely seeks reconsideration. It is unconscionable, particularly in light of the Commission's recent actions to spur DTV transition with the tuner mandate and the broadcast flag, to delay the public interest proceedings further while granting reconsideration of multicast.

With regard to the Constitutional issues, Mr. Feld stated that the NAB argument that imposing public interest obligations as a precondition of multicast violates the First and Fifth Amendments is wholly without merit. Consideration of public interest obligations must perforce take into account the environment in which the local broadcaster serves the community and who will view the programming. The courts have granted the FCC broad discretion in shaping public interest requirements in recognition of the fact that licensees owe their dominant position in the market place to government licenses and because licensees are, ultimately, trustees of spectrum for local citizens and must run their stations for the benefit of local citizens.

See Red Lion Broadcasting.

With regard to the First and Fifth Amendment claims by cable MSOs, the MSOs misconceive the holding of *Turner* when they argue that the increased presence of DBS changes the First Amendment calculus. The government has a compelling interest in maintaining an informed citizenry no matter how they receive their information, whether via news or via satellite. Requiring cable systems to carry more local news and information serves this purpose. The proper First Amendment inquiry is not whether information is somehow discoverable, so that if a citizen can arguably switch to DBS if it carries more information the government's interest is satisfied. Rather, the government's compelling interest in an informed citizenry allows the government to examine how citizens actually receive news and information. Where the vast majority of citizens receive news and information via broadcast signals retransmitted over cable, it is appropriate for the government to ensure carriage of all such signals ***if these signals serve the purpose of informing the citizenry.***

This provides yet another reason to impose significant public interest obligations, notably for local programming and access by political candidates. Only through such mandates can the Commission ensure that the mutlicast signals will, in fact, further the government's compelling interest.

Finally, Mr. Feld suggested that the Commission should move immediately to open the analog broadcast bands to unlicensed use. The public should not be denied access to these airwaves as a result of the delaying tactics by broadcasters. To the extent broadcasters have interference concerns, these concerns should be addressed by broadcasters vacating the analog spectrum.

In accordance with Section 1.1206(b), 47 C.F.R. § 1.1206, this letter is being filed electronically with your office today.

Respectfully submitted

Harold Feld
Associate Director
Media Access Project

cc: Jordan Goldstein